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No. 91-36

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

GEORGE W. JURGENS AND
MARGARET M. JURGENS,

Petitioners,

vs.

TIMOTHY McKASY d/b/a TONKA MARKETING
AND CBK, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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1991 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

QUESTION PRESENTED

Whether the Court of Appeals was correct in concluding that it was an abuse of discretion to increase Lanham Act damages "as a penalty" against respondent, where that Act explicitly requires that any increase in damages may only be made if the increase "shall constitute compensation and not a penalty," 15 U.S.C. § 1117(a), and the record includes, *inter alia*, the district court's own statements that its increased award was "punitive in nature" and "a windfall to plaintiffs."

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit which is the subject of the petition is reported at 927 F.2d 1552. In addition, an earlier opinion of the Federal Circuit in this case, dismissing petitioners' cross-appeal for lack of appellate jurisdiction, is also reported, at 905 F.2d 382.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, respondents draw the Court's attention to certain relevant factual errors and omissions in the petition:

Respondent CBK, Ltd., was at the time of trial a Tennessee partnership of Robert and Carl Kirkland that operated as an importer/distributor of products for the gift market. (It is now a sole proprietorship of Robert Kirkland.) It was not "a multi-million dollar corporation...engaged in the business of manufacturing and selling novelty products." Compare Pet. at 3.[1]

CBK advertises and distributes its products through a yearly catalog and a network of in-house and independent sales representatives, like respondent McKasy,[2] who carry CBK products in their show rooms and at trade shows. (C.A. App. at 802-03).[3] Compare Pet. at 4, 12.

Robert Kirkland, CBK's co-founder, first saw the petitioners' Northwind products in the summer of 1985 at a gift market trade show in Atlanta, Georgia where they were on display at an exhibit of Davol Marketing. (C.A. App. at 805-06). He picked up a Davol Marketing flyer on the product (C.A. App. at 2760-61) that had neither the Northwind name nor any patent indication on it. (C.A. App. at 806-07). Kirkland liked the idea of using the windsock decoy as a lawn ornament, but thought the

[1]Because CBK, Ltd. was a Tennessee partnership, not a corporation, and is now a sole proprietorship, the requirement in Supreme Court Rule 29.1 of a statement of parent and subsidiary corporations is not applicable.

[2]The increased Lanham Act damages which are the subject of the petition were awarded by the district court against respondent CBK only and not against respondent McKasy.

[3]"C.A. App." refers to the Appendix filed in the Court of Appeals.

decoy could be made more realistic. (C.A. App. at 808). He then directed Rita Clemons, a CBK employee, to develop more lifelike drawings for the heads and bodies for each of four different species of waterfowl (goose, duck, swan and seagull) to be used as the artistic basis for CBK's line of lawn ornament windsock products. (C.A. App. at 808). At this time, neither Kirkland nor anyone else at CBK was aware that any of the Northwind products were patented. (C.A. App. at 807-08, 1020).

Clemons researched the appearance of these four waterfowl. (C.A. App. at 996-98). Although she used the body of a Northwind product to trace an initial outline, she then modified her drawings under the express direction of Kirkland with the intention of creating a more lifelike replica of a fowl. (C.A. App. at 998-1002, 3366b). The markings and colorations of the body were based on her research of waterfowl and were very different from the markings and colorations on the Northwind product. (C.A. App. at 1370, 1380, 1755-62). Once Kirkland was satisfied that Clemons' drawings had attained a sufficient level of realism, he directed a manufacturer to develop a prototype based on those drawings. (C.A. App. at 1018-19, 1492-96, 1931-40, 1989).

CBK advertised its products in its 1986 catalog and received the first shipments of the products in January, 1986. (C.A. App. at 812, 2201-02). In 1987, CBK added three song bird models (robin, cardinal, bluebird) and an owl to its product line. (C.A. App. at 813-14, 2762-2805). Because it considered its artistic designs original, CBK copyrighted each of the eight models of its products. (C.A. App. at 813, 1895-1930).

Because each of CBK's products and the Northwind

products is designed to represent a real species of bird, each product has different markings and colorings. Petitioners' admit that none of CBK's products is identical to any of the Northwind products. (C.A. App. at 1370, 1380). Each of the witnesses that addressed the issue testified that the markings and colorations for both the head and body for each of the CBK models (referred to as ornamental markings) were noticeably different from the markings and colorations on the closest corresponding Northwind product. (C.A. App. at 546-47, 656-64, 1370, 1380). The only similarity that petitioners were able to identify between the Northwind products and the CBK products was the general idea of a windsock decoy comprised of a head and neck, a stake, a hoop and a windsock, all together resembling a bird. (C.A. App. at 655, 1399, 1406). Petitioners admitted that there was not a single non-functional feature on the CBK product that the public would identify solely with Northwind. (C.A. App. at 607, 658-64, 1402).

Petitioners state that CBK conducted none of its own advertising and that CBK advertised its product with only a single page of advertising. Neither statement is accurate. It is true that each year a page in each of the thousands of catalogs that were distributed by CBK was dedicated to windsocks. CBK's primary means of promoting its product, however, consisted of (1) its approximately one hundred independent sales representatives, (2) the representatives' showrooms in which the product was displayed, and (3) the national and local trade shows at which the product was displayed by CBK and its representatives. (C.A. App. at 801-03, 128, 2084).

Petitioners claim that CBK used information contained

in a Northwind brochure by placing it on a CBK product display box and that CBK's name did not appear on the box. In fact, CBK is identified as the manufacturer on the "header" (the label) of each packaged product, and the packaged products with the headers were placed in each box. (C.A. App. at 1499). In addition, it does not appear that petitioners ever had any display box, let alone a display box similar to CBK's. (C.A. App. at 1500-01).

Petitioners state that the most prominent words on the headers of CBK's packages were the words "wind decoy," as they are on the Northwind packaging. An examination of the headers (*see, e.g.*, C.A. App. at 1755) and the testimony (C.A. App. at 554) shows that in fact the CBK heading is "LAWN DECORATION WIND DECOY" and the words "lawn decoration" are in the same print and are as prominent as "wind decoy."

Petitioners state that upon CBK's entry into the market their product sales dropped dramatically. It is undisputed that CBK entered the market in January 1986. (C.A. App. at 721). Petitioners' sales in 1986 were more than $2 million, an *increase* of over $600,000 (44%) from 1985 sales. (C.A. App. at 3461).

The testimony was uncontradicted that in the gift market the life cycle of a product like windsock decoys is two to three years. (C.A. App. at 968). From 1986 to the beginning of 1989, petitioners had over $4,000,000 in sales, with their tax returns reflecting a net *profit* of over $1,000,000. (C.A. App. at 1830, 3922-23). During the same time period, CBK had sales of $1,700,000 with a *loss* of approximately $400,000 (C.A. App. at 839, 3378), and McKasy's customers ordered less than 7,500 units, earn-

ing him less than $2,700. (C.A. App. at 3382).[4]

With respect to petitioners' claim for trade dress infringement under the Lanham Act, the jury returned a verdict for petitioners and found $243,350 in damages ($1,350 against McKasy and $242,000 against CBK). Although the jury concluded that the trade dress infringement had been willful, in that CBK had intentionally copied the basic appearance of the petitioners' product, there was no finding of bad faith on the part of respondents. As the trial court later commented, "the issue of whether or not the appearance of plaintiffs' product was entitled to protection under the Lanham Act was very close in this case." Pet. App. at A-29.

REASONS FOR DENYING THE WRIT

In an effort to interest this Court in granting review, petitioners have incorrectly stated the relevant holding of the Federal Circuit in this case. That court did not hold, as petitioners suggest, that it is inappropriate to consider an infringer's willfulness or bad faith conduct in determining whether to increase damages under the Lanham Act, specifically 15 U.S.C. § 1117(a). Rather, the Federal Circuit

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[4]Petitioners also claim that there was "uncontroverted evidence" of compensatory damages in excess of $1 million. Pet. at 12 n.3. This claim is incorrect. Petitioners' "evidence" was simply an assumption that petitioners were entitled to their own incremental profits figure on every bird CBK sold. (C.A. App. at 1321-24). This assumption was "controverted" repeatedly. (C.A. App. at 1302-24). Furthermore, petitioners' own expert never testified that petitioners' lost profits were even close to $1 million. Rather, they were at most closer to $500,000 *if* the controverted assumptions were accepted. (C.A. App. at 3328).

More importantly, after the jury received the controverted evidence, petitioners asked the jury to determine the amount that would fully compensate them. The jury awarded a total of $243,350 for Lanham Act damages and $12,600 (against McKasy) for patent damages. Petitioners did not challenge the adequacy of the amount that the jury awarded. They never asked the trial court to determine that this amount was insufficient, nor did they appeal that award.

held that, based on the record in this case, it was clear that the district court increased the jury damage award "as a penalty" against respondent CBK, that this was an impermissible reason for increasing Lanham Act damages, and that therefore the district court had abused its discretion in increasing the Lanham Act award. *See* Pet. App. at A-23.

This holding of the Federal Circuit was entirely correct, and does not present an issue necessary for this Court to review. It is not only consistent with, but is mandated by, the clear language of the statute, which specifically says that any increase in damages may only be made if the increase "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). Not surprisingly, no case which petitioners cite as "in conflict" with the instant decision holds to the contrary. Indeed, those circuits which have actually considered the specific question of Lanham Act damages awarded as a penalty have all agreed with the Federal Circuit here that the statute means what it says, that increased Lanham Act damages may not be awarded as a penalty. Moreover, the Federal Circuit decision is consistent with and dependent upon the record in this case, which reflects, as the district court admitted and the court of appeals confirmed, that the award of increased damages was "punitive in nature" and "a windfall to plaintiffs," Pet. App. at A-29, that petitioners invited this error by urging the district court to increase the award for "one reason...to punish defendants," Pet. App. at A-22, that "the Jurgens advanced no other reason at trial why the district court should have increased damages," Pet. App. at A-23, and that "[t]he Jurgens' argument that the judge increased damages with 'compensation' in mind is

disingenuous." Pet. App. at A-22.

1. The language of the Lanham Act on this point is simple and clear: while a district court has discretion to increase damages in certain circumstances, that discretion is subject to statutory limitations, one of which is that any such increase "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a).

Subject to the principles of equity, a successful Lanham Act plaintiff may recover three types of damages: "(1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." *Id.* "In assessing damages, the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive, the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case." *Id.* But, "[s]uch sum in either of the above circumstances shall constitute compensation and not a penalty." *Id.* Thus, if the district court is dissatisfied with the amount "found" as actual damages based on such evidence as could be presented, or if it feels the amount of recovery based on profits is unjust, it may increase the award to make it fit what it perceives to be the circumstances of the case, as long as that increase is compensation, consistent with the three types of recovery which the statute allows, and is not a penalty.

The relevant legislative history is fully consistent with this straightforward language and the Federal Circuit's interpretation thereof in this case. Because this history

has been recently and thoroughly analyzed and set forth in detail by the Second Circuit in *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 108-112 (2d Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989), it need not be reiterated in detail here. In summary, § 35 of the Lanham Act, currently 15 U.S.C. § 1117(a), incorporated § 16 from the 1905 Act, 33 Stat. 728 (remedy at law for registered trademark infringement), as well as § 19, 33 Stat. 729 (remedy in equity). While § 16 gave the district court discretion to increase an award of actual damages up to three times its amount, and § 19 allowed for recovery in equity based on an infringer's profits, neither section contained provisions for punitive damages. Unlike the patent law models for the 1905 Act, which allowed increased damages as a punitive concept, the 1905 discretionary enhancement provision was remedial rather than punitive in nature, "included to enable courts to redress fully plaintiffs whose actual damages were difficult to prove." 858 F.2d at 110.

Any doubt on this point was eliminated by the drafters of the Lanham Act itself. They added the explicit caveat that enhancement of a damage award or adjustment of profits awarded must "constitute compensation and not a penalty." They also provided that recovery was limited to three types of damages (infringer profits, damages suffered by the plaintiff, and costs of the action), and made all monetary recovery "subject to the principles of equity." As the Second Circuit noted, these additions and the legislative history surrounding them show that the provisions for discretionary increase of damages awarded were to recognize and allow adjustment for problems of proof facing plaintiffs in such cases, 858 F.2d at 111, not to allow windfalls or punishments. Moreover, in addition to

the rule that "absent express statutory authority, punitive damages are not ordinarily recoverable in equity," 858 F. 2d at 111, here the "express statutory authority" affirmatively states that damages are limited to three types, and that no damages may be awarded as a penalty.

2. The relevant caselaw is in full accord. While some courts have required that there be a showing of willfulness or bad faith before increased damages may be awarded, *see, e.g., Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989) (enhanced damages properly invoked when infringement is deliberate); *Boston Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 597 F.2d 71, 77 (5th Cir. 1979); *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636, 641 (D.C. Cir. 1982) (per curiam) (award of defendant's profits requires showing of bad faith or willful infringement), none has held that damages under the Lanham Act may be increased as a penalty or as a windfall. Some cases thus appear to use bad faith as a trigger for damage adjustment, but none says the actual adjustment may be divorced from real damages. This includes the cases cited by the petitioners as being in "direct conflict" with the instant decision. *See* Pet. at 7. Some of these decisions do not even discuss the "compensation and not a penalty" provision of the Lanham Act: *Ramada Inns, Inc. v. Gadsden Motel Co.*, 804 F.2d 1562 (11th Cir. 1986), merely affirms without discussion a district court's exercise of its discretion in trebling the damages. *See* 804 F.2d at 1568. Similarly, *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989), does not discuss the "not a penalty" provision; it notes that trebling may be invoked when infringement is deliberate, but does not state that it may be awarded as

a penalty, and does not indicate that the trebled award was even challenged on that ground in that case. *See id.* at 436.[5] *Polo Fashions, Inc., v. Craftex, Inc.*, 816 F.2d 145 (4th Cir. 1987), does not even deal with increased Lanham Act damages. *See* 816 F.2d at 149 ("We need not consider whether, under these circumstances, the plaintiff was entitled to an award of damages under the Lanham Act, for it clearly was entitled to such an award upon its common law claim of unfair competition and its claim under North Carolina's Unfair Trade Practices Act....The district court...trebled that amount under the North Carolina statute.").

Indeed, those courts which have actually addressed the "not a penalty" provision, including the rest of the cases cited by petitioners as being in conflict with the Federal Circuit's decision as well as other cases not cited by them, fully agree that Lanham Act damages may not be awarded as a penalty. *See Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1127 (5th Cir. 1991) ("An enhancement of damages may be based on a finding of willful infringement, but cannot be punitive.... [E]nhancement could, consistent with the 'principles of equity' promoted in section 35, provide proper redress to an otherwise undercompensated plaintiff where imprecise damages calculations fail to do justice, particularly where the imprecision results from defendant's conduct."); *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d at 113 ("In sum, we hold that § 35 of the Lanham Act does not authorize an additional award of punitive damages for

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[5]Although *Gorenstein* does not discuss the "not a penalty" provision, it does cite *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 746 (7th Cir. 1985). *See* 874 F.2d at 436. As noted *infra*, *Otis Clapp* clearly recognizes that enhanced Lanham Act damages may not be awarded as a penalty. *See* 754 F.2d at 744-45. There is thus no conflict between the Seventh Circuit and the instant decision on this point.

willful infringement of a registered trademark. So long as its purpose is to compensate a plaintiff for its actual injuries—even though the award is designed to deter wrongful conduct—the Lanham Act remains remedial."); *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 744-45 (7th Cir. 1985) ("§ 1117 forbids the district court from allowing recoveries that are so excessive as to amount to a penalty.... § 1117 explicitly allows the district court to exercise its discretion, limited only by the admonition that the award may not constitute a penalty.... Because the district court's award cannot be characterized as a penalty, we hold that the district court did not abuse its discretion ...."); *Metric & Multistandard Components Corp. v. Metric's, Inc.*, 635 F.2d 710, 715 (8th Cir. 1980) ("The language of section 35 is clear: the district court is given broad discretion to award the monetary relief necessary to serve the interests of justice, provided it does not award such relief as a penalty."),[6] *Boston Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 597 F.2d at 77 ("We hold only that increased damages cannot be upheld on the basis of the findings made below.... We would be reluctant to approve increased damages intended solely as punishment for conduct unrelated to the trademark infringement or to the actual damages caused by it. On the other hand, we might agree that increased damages may be justified by defendant's withholding or misrepresenting available sales records, which would have the effect of making much more difficult, if not impossible, plaintiffs' proof of damages or profits."); *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d at 642 n.11 ("[T]he court should strive to assure that the award it orders will deter the defendant, yet not

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[6]This is the Eighth Circuit case which the Federal Circuit followed here because it expressed the views of the regional circuit in which the district court sits on this Lanham Act issue, over which the Federal Circuit does not have exclusive appellate jurisdiction. *See* Pet. App. at A-21.

be a windfall to plaintiff nor amount to punitive damages."). *See also Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 917-918 (Fed. Cir. 1984) ("Section 1117 confers a great deal of discretion on a district court in fashioning a remedy for trademark infringement.... Nevertheless, any award ...'shall constitute compensation and not a penalty,' and all awards are expressly subjected to the 'principles of equity.' ... Defendant may not retain the fruits, if any, of unauthorized trademark use or continue that use; plaintiff is not, on the other hand, entitled to a windfall."); *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 970 (D.C. Cir. 1990) ("Given [statutory restriction against penalty], if the district court decides to enhance damages under section 35(a), it should explain why the enhanced award is compensatory and not punitive.").[7]

There is no conflict among the circuits concerning interpretation of the "not a penalty" provision of the Lanham Act, let alone a square conflict requiring the exercise of this Court's review power.

3. Despite the Federal Circuit's reference to their argument as "disingenuous," Pet. App. at A-22, petitioners still urge upon this Court the argument that the increased damages award was actually made by the district court

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[7]The same is true of this Court's decisions concerning the 1909 Copyright Act, which petitioners also invoke. Although that Act contains somewhat different language concerning damage awards and is therefore not directly analogous, *see* 17 U.S.C. § 101(b), neither *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952), nor *Douglas v. Cunningham*, 294 U.S. 207 (1935), approves the use of a Copyright Act award "as a penalty." Indeed, the Court noted that while the district court is afforded discretion under that Act "to determine whether it is more just to allow a recovery based on calculation of actual damages and profits, as found from evidence, or one based on a necessarily somewhat arbitrary estimate," such an estimate may only be made "within the limits permitted by the Act." 344 U. S. at 231-232. "'Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them.'" *Id.* at 232 (quoting *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106-107).

with compensation in mind. The opposite is true, which is demonstrable from the district court's own words. In addition to the district court's repeated references to the increased award serving as a punishment, which the Federal Circuit quoted in its opinion, Pet. App. at A-22-23, the district court also stated explicitly that the increased Lanham Act award was "punitive in nature," and "a windfall to plaintiffs." Pet. App. at A-29. The district court thus left no doubt as to whether the award of increased damages was to compensate petitioners; rather, it was a "windfall" to them. And the award was clearly being used as a penalty against respondents; it was "punitive in nature." *Id.*

As the court of appeals also observed, this error by the district court was invited by petitioners themselves. They expressly told the district court that "the purpose of the trebling provisions is to punish the defendants ...." Pet. App. at A-22. As the court of appeals also found, after a careful review of the record, "the Jurgens advanced no other reason at trial why the district court should have increased damages." Pet. App. at A-23. They did not complain to the trial court that the jury's damage award was inadequate as compensation, and they did not appeal the amount of that award.[8]

The record in this case fully supports the court of

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[8]Petitioners state that "the District Court denied the Jurgenses' motion for attorneys' fees largely because it believed that the increased damages award adequately compensated the Jurgenses." Pet. at 11. This statement is inaccurate. The *primary* reason cited by the district court for not awarding attorneys' fees was that the case did not meet the Lanham Act requirement, found in 15 U.S.C. § 1117(a), of being "an exceptional case." "First, the Court does not believe that this is an exceptional case." Pet. App. at A-29. (The court noted in this regard that, despite evidence of copying the basic appearance of petitioners' product, "the issue of whether or not the appearance of plaintiffs' product was entitled to protection under the Lanham Act was very close in this case." *Id.*) Petitioners did not appeal the district court's denial of their motion for attorneys' fees.

appeals' decision with regard to the impropriety of the increased Lanham Act damages award. It does not merit further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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